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FILED
MAR 23 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 65

THE UNITED STATES,

Petitioner,

v.

BINGHAMTON CONSTRUCTION CO. INC.

On Writ of Certiorari to the United States Court of Claims.

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On March 8, 1954, this Honorable Court rendered its Opinion reversing the Judgment of the Court of Claims of the United States rendered on October 7, 1952, granting Respondent damages in the sum of $7,363.22, because of a Contract misrepresentation due to an erroneous Wage Schedule incorporated in said Contract.

Respondent respectfully prays for a rehearing in accordance with the provisions of Rule 33 of the Rules of this Court, upon the questions and for the reasons hereinabove set forth

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I.

By its judgment of reversal, this Honorable Court has ratified the contracting officer's usurpation of authority given only to the Secretary of Labor by the Davis-Bacon Act.

On March 29, 1941, when bids for the subject Contract were invited, the Secretary of Labor's most recent determination of the prevailing wage rates for the City of Elmira, was her Decision of March 4, 1941, finding the prevailing hourly wage rate for carpenters to be $1.125 and for laborers to be $.55.

Although said Decision resulted from a request by the Federal Works Agency, for one of its projects in said City, the Davis-Bacon Act contains no provisions restricting a Wage Determination for a given area to any one contract,—and the wording of said Decision of March 4th, clearly shows the Secretary's intention that same was to supersede any and all prior Decisions for Elmira,[1] including that of January 31, 1941, issued for Respondent's Contract, wherein the prevailing hourly wage rate for carpenters was found to be $1.00 and for laborers to be $.50.

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1. The Secretary of Labor's Wage Decision of March 4, 1941, contains the following preliminary statement,—

> "Since the prevailing rates of wages for the requested classifications re laborers and mechanics in the vicinity of Elmira *have not been determined recently under the Act*, the Secretary of Labor, in accordance with Department Regulations (Reg. 503, dated 9/30/35), appointed a referee to investigate the wages paid on such work in that locality. In the course of his investigation at Elmira and vicinity, the Referee interviewed various representatives of labor, contractors, local public officials and other parties believed to be interested." (Emphasis added.)

and the following ruling to wit,—

> "*These rates are to be considered prevailing for ninety days from the date of this decision,* unless the decision is changed prior to the expiration of that period for contracts unawarded at that time." (Emphasis added.)

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If, as determined by the Court below, the Contracting Officer knew or should have known of the Secretary's said Decision of March 4th, before inviting bids for Respondent's Contract on March 29th,—then, in effect, it was the Contracting Officer and not the Secretary of Labor who determined the minimum wage rates incorporated in Respondent's Contract, when he arbitrarily permitted the outdated, superseded and erroneous Wage Rates of January 31, 1941 to remain in the Specifications,—and by doing so, misled Respondent and brought about the loss for which the Court below awarded judgment.

We respectfully submit, that neither said right of election exercised by the Contracting Officer in the instant case, nor the resulting insertion of *conflicting* Minimum Wage Schedules in two contracts being performed concurrently in the same area, was contemplated when the Davis-Bacon Act was made law.

II.

The issue of law defined in the opening paragraph of the opinion and decided adversely to respondent by this Honorable Court, is not the issue presented for determination by Paragraph 5 of the Amended Petition[2] and consistently urged by respondent.

Respondent has never claimed that in bidding for the subject Contract it relied upon, or was entitled to rely upon, the erroneous Contract Wage Schedule *as a representation or warranty of the wages it would be required to pay in performing the work.* This is evidenced by the fact that although in mid-contract, the hourly wage rate for carpenters was increased from $1.125 to $1.25 and for

2. (R. 37-38).

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laborers from $.625 to $.75, Respondent made no claim for such increase.[3]

Respondent does contend—that since the Contract and Specifications asserted that the Minimum Wage Schedule conformed to the requirements of the Davis-Bacon Act, *Respondent had the right to and did rely upon the accuracy and truth of said statement*—to its ultimate loss and damage in the sum of $7,363.22, when, as discussed under Point I above, said representation proved to be false.

By the adoption of Labor Department Regulation #503, for the administration of the Act, the Secretary of Labor has set a standard for the thoroughness of the investigation deemed necessary to determine the wage rates prevailing in any given area,—and we respectfully submit, that *the Contract assertion of due compliance with the Act was in effect, a representation that the Contract Wage Schedule reflected the wage rates found to be prevailing in the Contract area, by an investigation made in conformance to said Regulation #503.*

While it is true that Respondent could have discovered the errors in the Contract Wage Schedule by an independent investigation prior to preparation of its bid, said Contract representation led it to believe that any such investigation would be superfluous.

This Court has heretofore repeatedly held that a contractor was not to be deemed negligent in accepting as true, without independent examination, the results incorporated in a contract, of an investigation alleged to have been made by the owner.[4]

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3. (R. 16—Com. Finding 13).

4. *Hallerbach* v. *United States*, 233 U. S. 165, 172; *Christie* v. *United States*, 237 U. S. 234, 242; *United States* v. *Spearin*, 248 U. S. 132, 136; *United States* v. *Utah Stage Co.*, 199 U. S. 414, 424; *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1; *Kingston, et al.* v. *L. P. & J. A. Smith Co.* (C. C. A. 6th Circuit), 114 Fed. Rep. 294.

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We respectfully submit that the facts warrant the application of said Rule to the instant case—and an affirmance of the judgment of the Court below.

III.

By its judgment of reversal, this Honorable Court has denied to Respondent the relief heretofore approved and allowed with respect to a claim based upon similar facts.

We respectfully submit, there is no essential difference between the facts presented in the instant case and those that prevailed with respect to the Labor Claim in *Albert & Harrison Inc.* v. *United States,* 107 C. Cls. 292, 68 Fed. Sup. 732, certiorari denied, 331 U. S. 810.

In the interest of justice, it would appear that Respondent should be afforded the relief granted by the Court below, in conformance with and reliance upon the authority of said case.

CONCLUSION.

For the above reasons, it is respectfully urged that a rehearing be granted in order that complete justice may be effected.

Respectfully submitted,

JEROME BEAUDRIAS,
Counsel for Respondent,
the Petitioner herein,
83-85 Warburton Ave.,
Yonkers 2, New York.

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Certificate of Counsel.

I, JEROME BEAUDRIAS, Counsel for Binghamton Construction Co. Inc., the petitioning Respondent above named, do hereby certify that the foregoing Petition for a rehearing of this cause is presented in good faith and not for delay.

JEROME BEAUDRIAS,
Counsel for Respondent,
the Petitioner herein.

March, 1954.

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